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BMW OF NORTH AMERICA, LLC

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

KEVIN MORRIS, GLENN R. SEMOW and CHAD J. COOK, On Behalf of Themselves and All Others Similarly Situated,

Plaintiffs,

v.

BMW OF NORTH AMERICA, LLC,

Defendants.

CASE NO. C 07-02827 WHA

CLASS ACTION

DEFENDANT BMW OF NORTH AMERICA, LLC'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT [F.R.C.P. 12(b)(6) and (9)(b)]

Date: November 1, 2007
Time: 8:00 a.m.
Judge: William H. Alsup

TO PLAINTIFFS AND TO THEIR ATTORNEYS OF RECORD:

NOTICE is hereby given that on November 1, 2007, at 8:00 a.m., or as soon thereafter as the matter may be heard, defendant BMW of North America, LLC ("BMWNA"), will and does hereby, move the Court, pursuant to Rule 12(b)(6) and Rule 9(b) of the Federal Rules of Civil Procedure, for an order dismissing with prejudice plaintiffs' First Amended Complaint in its entirety, or, in the alternative, dismissing claims as to particular plaintiffs.

This Motion to Dismiss is made on the grounds that plaintiffs' First Amended Complaint fails to state a claim upon which relief can be granted. Plaintiffs are unable

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to plead a claim under California's Unfair Competition Law ("UCL"), California Business & Professions Code, § 17200, *et seq.*, because plaintiffs did not suffer injury and lose money as a result of the alleged unfair competition. Plaintiffs did not suffer injury in fact and lose money as a result of an alleged unlawful business practice. Plaintiffs do not allege facts sufficient to state a claim based on an unfair business practice. Plaintiffs do not allege facts sufficient to state a claim for a fraudulent business practice. Plaintiffs' First Amended Complaint fails to meet Rule 9(b) standards for pleading a claim based on fraud. Plaintiffs' Complaint fails to plead a claim for violation of California Consumer Legal Remedies Act ("CLRA"). CLRA only applies where there was unfair methods of competition or unfair or deceptive acts or practices "undertaken by a person in a transaction intended to result or which results in the sale or lease of goods" to a consumer. Cal. Civil Code § 1770(a). BMWNA was not involved in a transaction with these plaintiffs. Additionally, the claim alleging "false or misleading statements" in violation of Cal. Civil Code § 1770(a)(13) fails to meet Rule 9(b) standards. The claim alleging violation of Cal. Civil Code § 1770(a)(19) fails because it is not unconscionable to exclude tires from a manufacturer's warranty. Plaintiffs fail to allege facts to support a claim for breach of implied warranty of merchantability as plaintiffs' First Amended Complaint effectively admits that their vehicles provided safe, reliable transportation, for thousands of miles of safe and reliable driving.

This motion is based on the files, records and proceedings, this Notice of Motion, the Memorandum of Points and Authorities submitted concurrently, and the argument of counsel.

DATED: September 25_,2007

LEWIS, BRISBOIS, BISGAARD & SMITH, LLP

By: _____

Jon Kardassakis
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STATUTES

RULES

OTHER

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MEMORANDUM OF POINTS AND AUTHORITIES

1. INTRODUCTION

Defendant BMW of North America, LLC ("BMWNA") is a distributor of BMW automobiles. Plaintiffs complain that certain 2006 and 2007 BMW 3 series vehicles equipped with Turanza EL42 "run-flat" tires or equipped with Potenza RE050 "run flat" tires manufactured by Bridgestone Firestone North American Tire, LLC ("Bridgestone") wear unevenly and prematurely, resulting in a rough ride and excess noise from the tires. (First Amended Complaint ("FAC"), ¶ 2.) Plaintiffs complain that the tires must be replaced prematurely. (FAC, ¶ 2.) The FAC purports to allege three causes of action for (1) violation of California's Unfair Competition Law ("UCL"), Cal. Business & Professions Code ("B&P") §17200 et seq., as a result of an alleged secret warranty program in violation of Cal. Civil Code §1795.90, or other conduct plaintiffs label as an unfair practice or fraudulent business practice; (2) violation of the Consumer Legal Remedies Act ("CLRA"), Cal. Civil Code §1770(a) (13) and (19); and (3) breach of an implied warranty of merchantability, Cal. Commercial Code §2314.

As discussed in more detail below, plaintiffs do not have standing to maintain a claim for violation of the UCL. Following the passage of Proposition 64, a private plaintiff can bring this type of claim only if they suffer injury in fact and lose money or property as a result of an unlawful, unfair or fraudulent business practice. Plaintiffs do not meet that test. The facts pled establish they suffered no injury and did not lose money or property as a result of the acts alleged.

Plaintiffs have not and cannot allege a violation of CLRA against BMWNA because they did not enter into any transaction with BMWNA. Additionally, BMWNA cannot be found to have violated Cal. Civil Code § 1770(a) (13) by "[m]aking false or misleading statements of fact concerning reasons for, existence of, or amounts of price reductions" because plaintiffs do not allege facts to support

a claim that BMWNA made false or misleading statements. Plaintiffs allege omissions by BMWNA (see, for example, FAC ¶26), not false or misleading statements. Plaintiffs' allegations are also insufficient because they do not meet the requirements of FRCP 9(b). BMWNA cannot be found to have violated Cal. Civil Code §1770(a)(19), which prohibits inserting an unconscionable provision in a contract because, as a matter of law, it is not unconscionable for an automobile manufacturer or distributor to exclude tires from a warranty. Indeed, plaintiffs do not allege that any automobile manufacturer or distributor warrants tire wear.

Plaintiffs cannot state a claim for breach of an implied warranty of merchantability because tire wear is not a basic defect that renders a vehicle unfit for its ordinary purpose of providing transportation. Also, the implied warranty claim fails because there was no privity between plaintiffs and BMWNA as is required to maintain this claim under California law.

In considering this Motion, the court must accept all factual allegations pleaded in the Complaint as true, and construe them and draw reasonable inferences in favor of the non-moving party. *Cahill v. Liberty Mutual Ins. Co.*, 80 F3d. 336, 337-38 (9th Cir. 1996). It need not, however, accept as true, unreasonable inferences or conclusory allegations cast in the form of factual allegations. *Bell Atlantic Corp. v. Twombly*, 550 U.S. _, 127 S.Ct. 1955, 1964-1965 (2007). ("While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations (citations omitted), a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions. . . .")

2. PLAINTIFFS MORRIS, SEMOW AND COOK EACH LACK STANDING TO BRING A CLAIM UNDER UCL BECAUSE THEY DID NOT SUFFER INJURY IN FACT AND LOSE MONEY OR PROPERTY AS A RESULT OF THE ALLEGED UNFAIR COMPETITION

To plead a violation of B&P § 17200, *et seq.*, plaintiffs must allege unfair

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competition which is defined to mean and include "any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with Section 17500) of Part 3 of Division 7 of the Business and Professions Code." B&P § 17200. In November, 2004, California voters approved Proposition 64, which made substantive changes in B&P § 17204 and other parts of the UCL. Proposition 64 found and declared:

> These unfair competition laws are being misused by some private attorneys who:
>
> (1) File frivolous lawsuits as a means of generating attorney's fees without creating a corresponding public benefit.
>
> (2) File lawsuits where no client has been injured in fact.

(Proposition 64, Section 1(b)(1) and (2).) Proposition 64 revised B&P § 17204 to prohibit suits by persons other than the Attorney General or district attorneys or a person "who has suffered injury in fact and has lost money or property as a result of such unfair competition." *Meyer v Sprint Spectrum L.P.*, 150 Cal.App.4th 1136, 1139 (2007)("*Meyer*") ["To assert a claim under the UCL, an individual plaintiff must have suffered an 'injury in fact' and 'lost money or property as a result of [the alleged] unfair competition."]

The FAC's first count purports to plead a violation of California's UCL, based on an unlawful business practice with the unlawful business practice being an alleged violation of Cal. Civil Code §1795.90 et seq. (which the FAC refers to as the "Secret Warranty Act.") Civil Code §1795.92(a) provides: "A manufacturer shall, within 90 days of the adoption of an adjustment program, subject to priority for safety or emission-related recalls, notify by first-class mail all owners or lessees of motor vehicles eligible under the program of the condition giving rise to and the

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principal terms and conditions of the program." Plaintiffs allege BMWNA adopted an adjustment program within the meaning of the Act because in January 2007, it issued Technical Service Bulletin No. SI B 36 06 06 ("TSB").[1] (FAC, ¶29.) According to the FAC, "The TSB issued by BMW constitutes a secret warranty adjustment program pursuant to which BMW, with respect to the subject vehicles equipped with the Turanza run-flat tires, now (a) automatically pays for full replacement of tires (including 100% of labor) experiencing premature and/or irregular tire wear prior to 10,000 miles, and (b) automatically pays fifty percent (50%) of the replacement of tires (including 100% of labor) experiencing premature and/or irregular tire wear prior to 20,000 miles." (FAC, ¶31.) Plaintiffs' claim is that "BMW, however, has failed and refused to notify customers, including Plaintiff Morris, regarding the existence of the secret warranty program in the manner required by the Secret Warranty Act." (FAC, I¶31.)

A. MORRIS DID NOT LOSE MONEY OR PROPERTY AS A RESULT OF THE ALLEGED UNFAIR COMPETITION AS HE ADMITS HE ONLY HAD TO PAY FOR TWO OF THE FOUR TIRES REPLACED WHICH IS EXACTLY WHAT HE CLAIMS HE WAS ENTITLED TO

Morris admits his vehicle had at least 15,416 miles on the odometer when he replaced his tires. (FAC, ¶42.) According to plaintiffs' theory, pursuant to the TSB, BMWNA should have paid 50% of the replacement of Morris' tires including 100% of labor. Plaintiffs admit Morris received this. "Morris had all four tires replaced at Sonnen BMW. He was required to pay for two of the replacement tires,

---

[1] BMWNA denies it committed any violations and its references to plaintiffs' allegations should not in any way be deemed an admission that plaintiffs' allegations are correct or have merit. For example, plaintiffs mischaracterize the TSB as a warranty program which it is not.

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at a total cost of $450 plus sales tax." (FAC, ¶42.) His admission that he had four tires replaced, but paid for only two establishes as a matter of law that he did not suffer injury in fact and lose money or property as a result of the alleged violation. Pursuant to B&P §17204, since he did not suffer injury in fact and lose money or property as a result of the alleged violation, Morris has no standing to make a claim under UCL.

In an effort to correct this defect, the FAC adds new allegations that "Morris never received statutory notice of the TSB as required by the Secret Warranty Act and was not told that the reason for the reduction in price of the run-flat tires was and is because BMW had adopted a secret warranty adjustment program in light of its determination that the run-flats were and are defective." (FAC, ¶42). These new allegations do not overcome the limitation that B&P §17204 prohibits suits by persons other than the Attorney General or district attorneys or a person "who has lost money or property as a result of such unfair competition." *Meyer v. Sprint Spectrum, L.P.* 150 Cal.App.4th 1136, 1139 (2007) (*"Meyer"*) ("To assert a claim under the UCL, an individual plaintiff must have suffered an "injury in fact" and "lost money or property as a result of [the alleged] unfair competition.") Morris did not lose money or property.

B. SEMOW DID NOT LOSE MONEY OR PROPERTY AS A RESULT OF THE ALLEGED UNFAIR COMPETITION BECAUSE HIS VEHICLE DID NOT HAVE TURANZA TIRES

Plaintiffs' theory is that "[t]he TSB issued by BMW constitutes a secret warranty adjustment program pursuant to which BMW, with respect to the subject vehicles equipped with the Turanza run-flat tires" pays for replacement of tires subject to stated mileage limitations. (FAC, ¶31, emphasis added). Semow's vehicle did not have Turanza run-flat tires. His vehicle came equipped with Potenza run-flat tires. (FAC, ¶43.) Even assuming for sake of analysis there was a violation of Cal. Civil Code § 1795.92 (which BMWNA does not admit or

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concede), Semow did not suffer injury in fact and lose money or property as a result of the alleged violation because even if the TSB was a warranty program, it did not apply to the tires on Semow's BMW.

C. COOK DID NOT LOSE MONEY OR PROPERTY AS A RESULT OF THE ALLEGED UNFAIR COMPETITION AS PLAINTIFFS ADMIT THE TSB ONLY APPLIED TO TIRES WITH LESS THAN 20,000 MILES AND COOK DID NOT PAY MONEY TO REPLACE HIS TIRES UNTIL THEY HAD MORE THAN 20,000 MILES

The FAC adds a third plaintiff, Chad Cook, and alleges that on or about December 21, 2005, Cook leased a new 2006 BMW 330i equipped with Turanza run-flat tires. (FAC, ¶47). The FAC alleges that on or about October 16, 2006, when Cook's odometer read 17,127 miles, Cook took his BMW to a dealer who noted "tires are worn" and "uneven." (FAC, ¶49). He did not, however, replace any tires at that time. Cook did not lose money or property as a result of replacing tires before 20,000 miles.

Cook's tires were not replaced until more than six months later on April 27, 2007. (FAC, ¶50). The FAC does not allege how many additional miles Cook drove before his tires needed to be replaced, but concedes that sometime after February 1, 2007, mileage on the vehicle exceeded 20,000 miles. (FAC, ¶50). Cook did not replace tires until April 27, 2007. The facts alleged do not show that Cook suffered "injury in fact" and "lost money or property as a result of (the alleged) unfair competition" as is required under California law. *Meyer* at 1139.

D. IT IS NOT AN "UNFAIR PRACTICE" TO DECLINE TO WARRANT TIRE WEAR

The FAC pleads, "By failing to extend the TSB to the Potenza run-flat tires, and by failing to offer any remedy for the Potenza Class in connection with the premature and irregular tire wear described herein, BMW has engaged in unfair

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practices under Section 17200 and has violated the Secret Warranty Act because the condition exists in the Potenza run-flat tires is the same in all material respects as the condition that exists in the Turanza run-flat tires." (FAC, ¶72). To state a claim under the "unfair" prong of the UCL, it is not sufficient that a plaintiff simply label a practice "unfair" in a complaint. An "unfair" practice under the UCL is one "whose harm to the victim outweighs its benefits." *Saunders v Superior* Court, 27 Cal.App.4th 832, 839 (1994). A plaintiff must, among other things, allege a practice where "the consumer injury is substantial, is not outweighed by any countervailing benefits to consumers or to competition, and is not an injury the consumers themselves could reasonably have avoided." *Daugherty v American Honda Motor Co., Inc.*, 142 CalApp.4th 1394, 1503 (2006). See, also, *Klein v Earth Elements, Inc.*, 59 Cal.App.4th 965 (1997), where the court dismissed the claim. Plaintiffs do not allege that any automobile manufacturer or distributor warrants tire wear. Not warranting tire wear is apparently a common, if not standard practice, in the industry. As a matter of law, a decision not to extend a warranty to tire wear cannot amount to an "unfair" business practice so as to support a claim under UCL. Plaintiffs fail to plead they suffered actual injury and lost money as a result of an "unfair" business practice.

E. NO FACTS ARE PLED TO SUPPORT A CLAIM FOR FRAUDULENT BUSINESS PRACTICE

The FAC makes passing reference to "fraudulent business practices" (FAC, ¶75) without specifying who, what where or when. This fails to meet Rule 9(b) standards for a claim premised on fraud. Federal Rule of Civil Procedure 9(b) provides, in pertinent part, "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity . . . ." "Averments of fraud must be accompanied by 'the who, what, when, where, and how' of the misconduct charged." *Vess v. Ciga-Geigy Corp. USA,* 317 F.3d 1097, 1106 (9th Cir. 2003) *("Vess").* Rule 9(b) applies to the extent plaintiffs' purport to plead a

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violation of the UCL based upon a fraudulent business practice.

In *Vess,* Vess brought a diversity class action alleging the defendants acted illegally to increase sales of the drug Ritalin, in violation of the California Legal Remedies Act ("CLRA"), Cal. Civ. Code §§ 1750 et seq. and Cal. B&P §§ 17200 and 17500. Vess' complaint alleged the defendants conspired to, among other things, "fraudulently and falsely" represent that the diagnostic criteria for ADD in the Diagnostic and Statistical Manual were scientifically reliable and "in an effort to cover up this fraud" one defendant improperly clustered data. The District Court dismissed the complaint based on its failure to plead fraud with particularity as required by Rule 9(b). Vess argued on appeal that Rule 9(b) did not apply to his state law statutory claims. The Ninth Circuit disagreed: "It is established law in this circuit and elsewhere, that Rule 9(b)'s particularity requirement applies to state-law causes of action." *Vess* at 1103. "Vess is correct that fraud is not an essential element of California statutes on which he relies. (Citation omitted.) But he is not correct in concluding that his averments of fraud therefore escape the requirements of the rule." *Vess* at 1103. As the Ninth Circuit explained:

> In cases where fraud is not a necessary element of a claim, a plaintiff may choose nonetheless to allege in the complaint that the defendant has engaged in fraudulent conduct. In some cases, the plaintiff may allege a unified course of fraudulent conduct and rely entirely on that course of conduct as the basis of a claim. In that event, the claim is said to be "grounded in fraud" or to "sound in fraud," and the pleading in that claim as a whole must satisfy the particularity requirement of Rule 9(b). (Citations omitted.)

Vess at 1103-1104. The court recognized that a plaintiff may choose not to allege a unified course of fraudulent conduct in support of a claim, but rather to allege

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some fraudulent and some non-fraudulent conduct. In that event, only the allegations of fraud are subject to Rule 9(b)'s heightened pleading requirements. Rule 9(b)'s heightened pleading requirements applies to any averment of fraud supporting the claim. *Vess* at 1104.

"If particular averments of fraud are insufficiently pled under Rule 9(b), a district court should 'disregard' those averments, or 'strip' them from the claim. The court should then examine the allegations that remained to determine whether they state a claim." *Vess* at 1105. Vess purported to plead claims under Cal. Civil Code § 1770 and B&P §§ 17200 and 17500. The Ninth Circuit held, "To the extent that Vess alleges fraud, his allegations should be 'disregarded,' (citation omitted), or 'stripped from the claim,' (citation omitted), for failure to satisfy Rule 9(b)." *Vess* at 1105.

The passing reference to "fraudulent business practices," without specific allegations of "the who, what, when, where and how" of the misconduct charged, does not meet Rule 9(b) standards for a claim based on fraud. That averment must, therefore, be stripped away and cannot support the alleged violation of the UCL.

3. PLAINTIFFS HAVE NOT AND CANNOT PLEAD A CLAIM FOR VIOLATION OF THE CLRA

A. THERE WAS NO TRANSACTION BETWEEN BMWNA AND PLAINTIFFS AND THE ALLEGATIONS OF FALSE OR MISLEADING STATEMENTS DO NOT MEET RULE 9(b) STANDARDS

The FAC's second count alleges BMWNA violated Cal. Civil Code §1770(a)(13) and (19). Section 1770(a) provides, in pertinent part:

> The following unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or

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> lease of goods or services to any consumer are unlawful: . . .
>
> (13) Making false or misleading statements of fact concerning reasons for, existence of, or amounts of price reductions. . . .
>
> (19) Inserting an unconscionable provision in [a] contract.

Plaintiffs do not allege they were involved in a transaction with BMWNA. Additionally, as with the claim of a fraudulent business practice, a claim under Civ. Code § 1770(a)(13) that the defendant made false or misleading statements of fact is a claim premised on fraud. FRCP 9(b) applies and requires plaintiffs to plead the circumstances constituting fraud with particularity. "Averments of fraud must be accompanied by 'the who, what, when, where and how' of the misconduct charged." *Vess*, 317 F3d. 1097, 1106. In conclusory form, the FAC simply alleges, "At all pertinent times, BMW has made false and misleading statements of fact regarding the reason for its reduction of the price of run-flat tires by failing and refusing to disclose the existence of the secret warranty adjustment program at issue, by failing to disclose that the price of certain run-flat tires effectively are being reduced by BMW for certain customers in light of their defective nature and by representing that such price reductions are simply being offered to satisfy customers and/or to recognize the value of customers without disclosing the existence of the secret warranty adjustment program and the reasons for its adoption." (FAC, ¶89). The only particularity is with regard to things plaintiffs allege was not stated. The FAC lacks particularity as to any affirmative, false or misleading statement. There is no averment of who communicated any alleged false or misleading statements. As to why the uninformative averment that it was BMW is insufficient. As to where, the claim that "at all pertinent times" BMW made false statements does not satisfy the rule's requirement of particularized averments as to when. Nothing is alleged about where or how. The allegations of alleged non-disclosure do not save the claim, particularly in the absence of an

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allegation of any communications between BMWNA and these plaintiffs, and no facts indicating BMWNA had a duty to find and disclose anything to them.

In order to violate §1770(a)(19), the defendant must have inserted an unconscionable provision in a contract. This necessarily requires that the defendant was a party to a transaction with the plaintiffs and was a party to a contract that contained an allegedly unconscionable provision.

In *Nordberg v Trilegiant Corp.*, 445 F.Supp.2d 1082 (N.D. Cal. 2006) ("*Nordberg*"), Trilegiant marketed and sold membership programs for goods and services. Plaintiffs were consumers who alleged either that they were automatically enrolled in, and charged membership fees for, defendant's programs simply as a result of accepting a "free" or "no charge" trial memberships or were charged for membership despite no prior contact with defendant or their representatives. Plaintiffs sought to allege violation of CLRA and other claims. The court granted defendants' motion to dismiss as to plaintiff Smith whose claim was that he was charged for membership despite having had no contact whatsoever with the defendants. The court recognized that since he failed to allege any agreement was entered into with the defendants, he had no claim under CLRA:

> On the other hand, plaintiff Smith's interactions with defendants' agents do not involve any form of "agreement." Indeed, it is the express *lack* of agreement and the subsequent refusal to fully refund the unauthorized charges that lie at the heart of Smith's complaint. Accordingly, Smith has not stated a valid claim under the CLRA; his complaint is better handled as a common law claim for conversion.

Nordberg, 445 F.Supp.2d 1082 at 1097.

Plaintiffs' claims are fatally defective because plaintiffs do not and

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cannot allege that they entered into a transaction with BMWNA. BMWNA distributes vehicles to independent authorized dealers who, in turn, sell the vehicles to consumers. The FAC alleges that "[t]he subject vehicles at issue are manufactured, marketed and sold by BMW through its established network of licensed dealers and distributors." (FAC, ¶21). Plaintiff "Morris purchased a new 2006 BMW 330i … from Courtesy Motors, an authorized BMW dealership located in Chico, California." (FAC, ¶4.) Plaintiff "Semow purchased a new 2006 BMW 330i … from Weatherford BMW, an authorized BMW dealership located in Emeryville, California." (FAC, ¶5.) Plaintiff Cook "leased a new 2006 BMW 330i . . . from Brecht BMW, an authorized BMW dealership located in Escondido, California." (FAC, ¶6). None of the plaintiffs purchased or leased a vehicle from BMWNA. CLRA's prohibition against inserting an unconscionable provision in a contract necessarily cannot have been violated where, as here, there was no transaction between the plaintiffs and the defendant. The facts alleged provide no basis for a claim under Civ. Code § 1770(a) (13) or (19) against BMWNA.

B. IT IS NOT UNCONSCIONABLE TO EXCLUDE TIRES FROM A MANUFACTURER'S WARRANTY

The FAC alleges, "BMW's express warranty purports to disclaim coverage for tires …." (FAC, ¶ 53.) Plaintiffs allege "BMW's attempt to disclaim any and all coverage for the run-flat tires, in the face of its knowledge and conduct was unconscionable under all of the circumstances and should be deemed null and void." (FAC, ¶ 53.) Notably, plaintiffs do not allege that any automobile manufacturer or distributor provides a warranty that extends to the number of miles a consumer can drive before tires must be replaced. Plaintiffs do not make the absence of a tire wear warranty "unconscionable" simply by alleging that label. "[A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief requires more than labels and conclusions. . . ." *Bell Atlantic v. Twombly,* 550 U.S. __, 127 S.Ct. 1955, 1964-65 (2007).

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Plaintiffs' claim is that Turanza and Potenza run-flat tires are subject to "premature and uneven tire wear (including excessive noise) requiring that the tires be replaced . . ." (FAC, ¶23.) There is no allegation plaintiffs' vehicles, or any other vehicles equipped with Potenza or Turanza tires, have been involved in accidents or are likely to cause accidents. The facts alleged do not implicate a safety concern. When tires wear out, consumers replace them. The issue here is simply the economic issue of who has to pay for replacement tires. Nothing in California law supports a claim that is unconscionable for an automobile manufacturer or a distributor not to warrant tire wear.

4. PLAINTIFFS HAVE NOT AND CANNOT PLEAD A CLAIM FOR BREACH OF IMPLIED WARRANTY

A. THE FACTS PLED SHOW THAT THE VEHICLES PROVIDED SAFE AND RELIABLE TRANSPORTATION; THIS ESTABLISHES THERE WAS NO BREACH OF THE IMPLIED WARRANTY OF MERCHANTABILITY

California Commercial Code §2314 provides an implied warranty of merchantability. "Goods to be merchantable must be at least such as (a) Pass without objection in the trade under the contract description; and … (c) Are fit for the ordinary purposes for which such goods are used …." Cal. Comm. Code §2314 (2). A claim for breach of the implied warranty of merchantability requires that a plaintiff plead and prove, among other things, that the product was not fit for the ordinary purpose for which it is used.

In *American Suzuki Motor Corp. v. Superior Court*, 37 Cal.App.4th 1291 (1995) ("*American Suzuki*"), plaintiffs attempted to plead a class action seeking redress for, among other things, breach of the implied warranty of merchantability, based on allegations the Suzuki Samurai had a high center of gravity, a narrow tread width, and light weight, which combined to create an unacceptable risk of a deadly rollover accident. Plaintiffs did not allege they had been injured personally

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or had incurred any consequential property damage as a result of the design defect. They sought damages "measured by the cost of repairing the inherent safety defect in the Samurai." The trial court found that plaintiffs had presented sufficient evidence tending to show that the Samurai had an "inherent defect" consisting of "a roll-over propensity by reason of a high center of gravity and a narrow [track width]," and certified for class treatment two Commercial Code-based implied warranty counts and a Song-Beverly Act claim. Thereafter, the court denied Suzuki's motion to decertify the class. The Court of Appeal issued a peremptory writ of mandate directing the trial court to vacate its order certifying the class and denying Suzuki's motion to decertify the class, and directing the trial court to enter a new order granting Suzuki's motion to decertify the class. The court explained that the implied warranty of merchantability does not "impose a general requirement that goods precisely fulfill the expectation of the buyer. Instead it provides a minimum level of quality." (Citations omitted.) *American Suzuki* at 1296. The court recognized:

> Courts in other jurisdictions have held that in the case of automobiles, the implied warranty of merchantability can be breached only if the vehicle manifests a defect that is so basic it renders the vehicle unfit for its ordinary purpose of providing transportation. (See *Feinstein v. Firestone Tire & Rubber Co.* ("*Feinstein*"), supra, 535 F.Supp. 595; *Carlson v. General Motors Corp.* (4th Cir. 1989) 883 F.2d 287, 297-298, cert. den.; *Taterka v. Ford Motor Co.* (1978) 86 Wis.2d 140, 271 N.W.2d 653; *Skelton v. General Motors Corp., supra,* 500 F.Supp. 1181, 1191.)

American Suzuki at 1296. Only a small percentage of the Samurais sold had been involved in a rollover accident. The others had no claim for beach of the implied warranty:

> Because the vast majority of the Samurais sold to the putative class

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> 'did what they were supposed to do for so long as they were supposed to do it' (*Feinstein v. Firestone Tire and Rubber Co., supra*, 535 F.Supp. at p. 603), we conclude that these vehicles remained fit for their ordinary purpose. This being so, their owners are not entitled to assert a breach of implied warranty action against Suzuki . . . .

American Suzuki, 37 Cal.App.4th 1291, 1298-99.

In *Feinstein v. Firestone Tire & Rubber Co.* ("*Feinstein*"), 535 F.Supp. 595 (S.D. N.Y. 1982), cited by the court in *American Suzuki*, plaintiffs sought to obtain certification of a class action alleging certain Firestone tires were defective. In denying class certification, the court recognized that the bulk of the putative class owned tires that had not suffered a blow-out and that, accordingly, those putative class members had no claim. "Within the context of a suit for breach of implied warranty a 'defect' is of legal significance only if it renders a tire unfit for its intended purpose; and the undisputed evidence of actual performance is that the majority of the Firestone tires, whatever their imperfections may have been, did not have defects making them unfit for their intended use." *Feinstein* at 604-605.

In *Carlson v. General Motors Corp.,* (4th Cir. 1989) 883 F.2d 287, also cited by the court in *American Suzuki*, plaintiffs who had experienced no malfunction sought certification of an implied warranty class alleging that a latent defect caused their vehicles to experience "diminished resale value." (*Id.* at pp. 297-298.) In dismissing these claims the court held that Uniform Commercial Code section 2-314 did not encompass plaintiffs' "loss of resale value claims." The vehicles had "served the traditionally recognized 'purpose' for which automobiles are used. Since cars are designed to provide transportation, the implied warranty of merchantability is simply a guarantee that they will operate in a 'safe condition' and 'substantially free of defects.' [Citation.] Thus, 'where a car can provide safe, reliable transportation[,] it is generally considered

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merchantable.' [Citation.]" (*Ibid.*)

Here plaintiffs effectively admit their BMW's provided safe, reliable transportation. Plaintiff Morris purchased his BMW on or about August 4, 2005, and drove for 17 months and 15,416 miles before the dealer recommended his tires be replaced on or about January 15, 2007. (FAC, ¶ 42.) He then drove the vehicle for more than two additional months, and some unstated number of additional miles, before he replaced the tires on March 27, 2007. (FAC, ¶42.) The FAC does not claim he was involved in an accident or even that he had a flat tire. The only reasonable conclusion from the facts alleged is that Morris drove the car safely and reliably for something well over 15,416 miles. The FAC's silence on any subsequent developments implies Morris continues to safely drive the vehicle today.

Plaintiff Semow purchased his BMW on or about September 25, 2006. (FAC, ¶43.) He drove 16,214 miles before a dealer recommended he replace his rear tires. (FAC, ¶ 45.) He then went to an independent repair facility, which replaced those two tires. (FAC, ¶45.) The absence of an allegation regarding any event after he replaced two tires on December 23, 2006 implies that he continues to safely drive the vehicle and apparently is still driving on the two original tires that he does not allege have ever been replaced.

Plaintiff Cook replaced his tires on April 27, 2007. (FAC, ¶51). The mileage at that time is not disclosed. But he drove in excess of 20,000 miles before replacing the tires as the FAC alleges "[t]he mileage on Cook's BMW did not exceed 20,000 miles until sometime after February 1, 2007 . . ." (FAC, ¶50) and he drove for almost three more months before replacing the tires on April 27, 2007. (FAC, ¶51). Cook apparently continues to safely drive his BMW. There is no allegation of an accident, or even a flat tire.

Consumers expect tires to wear out and will have to be replaced. How many miles a particular vehicle gets before its tires need replacement can vary

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widely and is heavily influenced by, among other things, whether the vehicle has been properly maintained (including keeping the tires properly inflated), and the type of driving done. BMWNA did not warrant any particular tire life on plaintiffs' tires. In fact, BMWNA does not warrant any tires. As the court held in *American Suzuki,* "the implied warranty of merchantability does not 'impose a general requirement that goods precisely fulfill the expectation of the buyer. Instead it provides a minimum level of quality.'" (Citations omitted.) *American Suzuki* at 1296. The facts pled establish that the vehicles these plaintiffs purchased greatly exceeded the test of providing a minimum level of quality. As a matter of law, the count for breach of the implied warranty of merchantability fails to state a claim upon which relief may be granted. It should be dismissed.

B. THE BREACH OF IMPLIED WARRANTY CLAIM IS BARRED BY A LACK OF PRIVITY

"Privity of contract is a prerequisite in California for recovery on a theory of breach of implied warranties of fitness and merchantability. The general rule is that … there is no privity between the original seller and a subsequent purchaser who is in no way a party to the original sale." *All West Electronics, Inc. v M-B-W, Inc.*, 64 Cal.App.4th 717, 724 (1998); *Arnold v. Dow Chemical Co.*, 91 Cal.App.4th 698, 720 (2001) ("*Arnold*"). Exceptions to the general rule have been recognized in the case of foodstuffs, drugs, and pesticides. *Arnold* at 720. No exception is applicable here.

Facts pled in the FAC establish the privity requirement cannot be met here. Plaintiff Morris purchased his BMW from Courtesy Motors, an authorized BMW dealership in Chico, California. (FAC, ¶4.) Plaintiff Semow purchased his vehicle from Weatherford BMW, an authorized BMW dealership located in Emeryville, California. (FAC, ¶ 5.) Plaintiff Cook leased his BMW from Brecht BMW, an authorized BMW dealership in Escondido, California. (FAC, ¶6). Because plaintiffs concede they did not purchase their vehicles from defendant

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BMWNA, there is no privity. On this separate and additional basis, the third court should be dismissed.

5. CONCLUSION

Plaintiffs have not pled and cannot plead claims for violation of the UCL, CLRA or for breach of the implied warranty of merchantability. Accordingly, the court should dismiss each count and the FAC in its entirety.

DATED: September 25, 2007 Respectfully submitted,

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By: _____
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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 221 North Figueroa Street, Suite 1200, Los Angeles, California 90012.

On September 25, 2007, I served the following document(s) described as

NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS'AMENDED COMPLAINT

on all interested parties in this action by placing true copies thereof enclosed in sealed envelopes addressed as follows:

SEE ATTACHED SERVICE LIST

☒ (BY MAIL, 1013a, 2015.5 C.C.P.)

☐ I deposited such envelope in the mail at Los Angeles, California. the envelope was mailed with postage thereon fully prepaid.

☒ I am readily familiar with the firm's practice for collection and processing of correspondence for mailing. Under that practice, this document will be deposited with the U.S. Postal Service on this date with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on September 25, 2007, at Los Angeles, California.

Catherine M. Guerrero

CATHERINE M. GUERRERO

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SERVICE LIST

Morris, et al. v. BMW of North America, LLC
USDC Case NO. c 07-02827 WHA

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